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GENERAL HOLDINGS, INC.)

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

JENNA KASKORKIS and KIM  
CARTER, individually and on behalf of  
all others similarly situated,

Plaintiffs,

vs.

GENERAL NUTRITION CENTERS,  
INC., a Delaware Corporation,  
GENERAL HOLDINGS, INC., a  
Delaware Corporation, and DOES 1-10,

Defendants.

Case No. 3:16-cv-00990-WQH-JLB

JUDGE: HON. WILLIAM Q. HAYES  
CASE FILED: APRIL 22, 2016

DEFENDANT GENERAL  
NUTRITION CENTERS, INC.'S  
OPPOSITION TO PLAINTIFFS'  
MOTION TO COMPEL

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## TABLE OF CONTENTS

I. INTRODUCTION AND SUMMARY OF ARGUMENT.....	1
II. FACTUAL BACKGROUND .....	4
A. GNC’s Pricing Activity Is Not Uniform. ....	4
B. Plaintiffs’ Counsel Failed to Adequately Confer Regarding Discovery.....	5
III. ARGUMENT AND AUTHORITY .....	10
A. Plaintiffs’ Complaint Fails to Plead a Factual Basis Supporting Broad Class Discovery. ....	10
B. Even If Plaintiffs Plead Claims Related to “Other” Products, Plaintiffs’ Discovery Requests Are Unfairly Broad and Burdensome.....	14
C. GNC’s Responses and Production Are Reasonable.....	19
D. Sampling Is Appropriate if Discovery Is Ordered. ....	21
IV. THE COURT SHOULD STRIKE THE FORREST DECLARATION AS IMPROPER HEARSAY.....	22
V. CONCLUSION .....	23

## TABLE OF AUTHORITIES

### Page(s)

#### Cases

<i>Barnhart v. Safeway Stores, Inc.</i> , 1992 WL 443561 (E.D. Cal. Dec. 14, 1992).....	14, 21
<i>Block v. City of L.A.</i> , 253 F.3d 410 (9th Cir. 2001) .....	22
<i>Burlington N. &amp; Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.</i> , 408 F.3d 1142 (9th Cir. 2005) .....	20, 21
<i>Buycks-Roberson v. Citibank Fed. Sav. Bank</i> , 162 F.R.D. 338 (N.D. Ill. 1995) .....	17
<i>Crabtree v. Hayden, Stone Inc.</i> , 43 F.R.D. 281 (S.D.N.Y. 1967).....	17
<i>Cranney v. Carriage Servs., Inc.</i> , 2008 WL 2457912 (D. Nev. June 16, 2008) .....	21
<i>Crawford-El v. Britton</i> , 523 U.S. 574 (1998) .....	10
<i>Dziennik v. Sealift, Inc.</i> , 2006 WL 1455464 (E.D.N.Y. May 23, 2006).....	17
<i>Evans v. Calise</i> , 1994 WL 185696 (S.D.N.Y. May 12, 1994) .....	11
<i>Feske v. MHC Thousand Trails Ltd. P'ship</i> , 2012 WL 1123587 (N.D. Cal. Apr. 3, 2012).....	21
<i>Flanigan v. Am. Fin. Sys. of Ga.</i> , 72 F.R.D. 563 (M.D. Ga. 1976).....	17
<i>Harding v. Time Warner, Inc.</i> , 2010 WL 457690 (S.D. Cal. Jan. 26, 2010) .....	10

1	<i>Hatch v. Reliance Ins. Co.,</i>	
2	758 F.2d 409 (9th Cir. 1985) .....	17
3	<i>Micro Mot., Inc. v. Kane Steel Co.,</i>	
4	894 F.2d 1318 (Fed. Cir. 1990) .....	11
5	<i>In re Mortgagors of Temple-Inland Mortg. Corp.,</i>	
6	2001 WL 177181 (E.D. Pa. Jan. 24, 2001) .....	17
7	<i>Nicholas v. CMRE Fin. Servs., Inc.,</i>	
8	2009 WL 1652275 (D.N.J. June 11, 2009) .....	10
9	<i>Oppenheimer Fund, Inc. v. Sanders,</i>	
10	437 U.S. 340 (1978) .....	11
11	<i>Samsung SDI Co. v. Matsushita Electric Industrial Co.,</i>	
12	2007 WL 4328482 (C.D. Cal. May 17, 2007).....	11, 12
13	<i>Skillsky v. Lucky Stores, Inc.,</i>	
14	893 F.2d 1088 (9th Cir. 1990) .....	22
15	<i>Smith v. Lowe's Home Ctrs., Inc.,</i>	
16	236 F.R.D. 354 (S.D. Oh. 2006).....	21
17	<i>Smith v. T-Mobile USA, Inc.,</i>	
18	2007 WL 2385131 (C.D. Cal. Aug. 15, 2007) .....	21
19	<i>Soto v. Castlerock Farming &amp; Transp., Inc.,</i>	
20	282 F.R.D. 492 (E.D. Cal. 2012).....	21
21	<i>Spieker v. Quest Cherokee, LLC,</i>	
22	2008 WL 4758604 (D. Kan. Oct. 30, 2008).....	14
23	<i>Villegas v. J.P. Morgan Chase &amp; Co.,</i>	
24	2009 WL 605833 (N.D. Cal. Mar. 9, 2009) .....	10
25	<i>Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll.,</i>	
26	103 F.3d 294 (3d Cir. 1996) .....	11
27	<b>Statutes</b>	
28	Cal. Bus. & Prof. Code § 17500.....	22

**Other Authorities**

Fed. R. Civ. P. 9(b).....	11
Fed. R. Civ. P. 26(b)(1) .....	11
Fed. R. Civ. P. 26(b)(3)(C)(iii).....	21

## I. INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs' motion to compel seeks to obtain discovery that is wholly unsupported by Plaintiffs' own allegations and that is unfairly broad and burdensome in light of Plaintiffs' claims here. It also ignores the discovery and responses GNC already provided and compromises proposed by GNC, which were imminently reasonable under the circumstances. Plaintiffs' motion must therefore be denied.

Based on the two named plaintiffs' alleged purchase of three third-party branded products on sale from General Nutrition Centers, Inc.'s online website, GNC.com, Plaintiffs brought this putative class action seeking to represent a class of anyone in California who purchased *any of the thousands* of products from GNC.com in the last four years (without regard to how any of the products were priced or customers' reliance on that pricing). Yet Plaintiffs allege no *facts* in support of their broad class allegations. Instead, Plaintiffs impermissibly seek to bolster their unsupported class allegations through overbroad discovery requests aimed not at discovery of information related to their actual allegations, but to discovery of a viable claim (and class).

Notably, Plaintiffs demand *every* document regarding GNC's establishment of product pricing, both online and in-store, including for GNC-branded products (despite the fact that the named plaintiffs didn't purchase such products) and for GNC's membership pricing (despite the fact that the named plaintiffs are not members). Contrary to what Plaintiffs would have this Court order, however, class discovery is limited in time and scope. Plaintiffs fail to provide any cogent reason for the overbroad class discovery demanded that will impose considerable burden on GNC, especially given Plaintiffs' broad-based claim that GNC follows an unlawful general pricing *policy* that governs *all* GNC products. Further, indicative of their true motive, Plaintiffs brought this motion after rejecting reasonable compromises

1 proposed by GNC, including a sampling procedure whereby GNC could  
2 demonstrate that the pricing of other GNC products is not similarly situated to that  
3 of the products Plaintiffs purchased and GNC's agreement to provide documents  
4 and/or testimony relating to its policies for setting prices.

5 As detailed further below, GNC opposes Plaintiffs' motion for the following  
6 reasons:

7 **First**, Plaintiffs may not use broad-based discovery as a proxy for alleging  
8 specific facts sufficient to support their broad class allegations. On the basis of two  
9 named plaintiffs' purchase of three products from GNC's website, Plaintiffs seek to  
10 obtain discovery of every single product sold on GNC's website over the past four  
11 years, without limitation. Plaintiffs' broad discovery amounts to nothing more than  
12 an unsupported fishing expedition, aimed not at supporting Plaintiffs' allegations,  
13 but at finding a viable claim (or class). Plaintiffs' refusal to discuss compromise  
14 solutions proposed by GNC bolsters this conclusion. Faced with Plaintiffs'  
15 overbroad discovery requests, GNC responded by limiting its responses and  
16 production initially to those products specifically purchased by Plaintiffs, as no  
17 specific facts were alleged in Plaintiffs' First Amended Complaint ("FAC")  
18 regarding GNC's other products. GNC also agreed to provide discovery regarding  
19 its policies and procedures for setting prices. Further, as a compromise on its initial  
20 position, GNC then offered to agree on a sampling procedure in order to demonstrate  
21 to Plaintiffs why discovery into products beyond the three specifically alleged is  
22 improper. After initially engaging in discussions with GNC, Plaintiffs abruptly  
23 ceased all further meet and confer efforts on this issue, deciding instead to bring this  
24 issue before the Court. Plaintiffs' request to compel broad discovery seeking  
25 information about products for which they include nothing but conclusory  
26 allegations in their complaint must be denied.

27 **Second**, even if Plaintiffs had sufficiently alleged facts regarding other  
28 products, the discovery Plaintiffs insist upon is impermissibly broad. Plaintiffs

literally request every document regarding the establishment of pricing for every single product GNC sells both online and in-store, whether or not relied upon to actually set prices. Illustrative of the overbreadth of their requests, Plaintiffs seek information about the establishment of member pricing though the named plaintiffs are not members, and GNC branded products though the named plaintiffs purchased third-party branded products only. Further, the evidence sought by Plaintiffs about every product GNC sells is wholly unnecessary to support Plaintiffs' alleged theory that GNC follows a common unlawful pricing policy for all of its products. Plaintiffs' motion to compel such broad and burdensome discovery must be denied, especially where, as here, GNC has proposed reasonable compromises that would provide Plaintiffs with the discovery necessary to test their class claims and GNC's defenses to those claims.

**Third**, Plaintiffs fail to acknowledge discovery they have *already* obtained. GNC already produced ample class-related discovery, including (i) *four years* of sales records for the three products at issue, including in-store and online sales; (ii) *four years* of pricing calendars for these products (showing when these products were offered for sale and for how long); and (iii) internal screenshots of its pricing system. GNC has also agreed to produce discovery, through documents or testimony, about its policies and procedures for its pricing practices. Plaintiffs assert the documents already produced are of "unknown significance," which ignores that they specifically requested these documents and are asking for the same documents for all GNC products. Also, contrary to Plaintiffs' claims (and Mr. Kashima's declaration), GNC has produced lists of its entire online product offerings to assist Plaintiffs in choosing products for a sample set. Plaintiffs have also served GNC with an eleven-page 30(b)(6) Notice of Deposition, which GNC intends to respond to and designate witnesses to testify, and served a third party subpoena on Radial, the company hosting GNC's website.

Accordingly, as more fully detailed below, Plaintiffs' Motion must be denied. At most, if the Court believes discovery beyond the three products alleged in the FAC is appropriate, a sampling procedure is warranted to allow GNC to demonstrate pricing for GNC products is not uniform and to reduce the burden to GNC. Finally, GNC moves to strike the Declaration of Douglas E. Forrest as lacking personal knowledge and relying on inadmissible hearsay.

## II. FACTUAL BACKGROUND

### A. GNC's Pricing Activity Is Not Uniform.

GNC is a premier seller of third-party branded and proprietary supplements through GNC.com.<sup>1</sup> Declaration of Kevin Maloberti ("Maloberti Decl.") ¶ 2. Currently, GNC sells over *six thousand* different products online and more in-store. *Id.* GNC's business is divided into nine distinct product categories, each separately and independently responsible for the pricing of the products contained therein. *Id.* ¶ 3. In addition, at material times the GNC e-commerce team had authority to adjust prices. *Id.* Depending on the category and the product, GNC analyzes multiple factors to determine its pricing, including but not limited to competitor pricing, pricing history, cost, GNC revenue goals, and product performance. *Id.* ¶ 4. Throughout the class period, GNC offered products for sale online at regular, sale, best price, member, and member sale prices. *Id.* ¶ 5. In addition, GNC periodically offers various promotions—such as buy-one-get-one-free or buy-one-get-one-half-off, and offers coupons for select purchases. *Id.* Prices are re-evaluated frequently and are set for two-month merchandising periods, but subject to adjustment at any time depending on a product's sales performance and availability. *Id.*

Products vary considerably and include popular whey supplements (such as the one purchased by Kaskorkis), flax seed oil, toothpaste, vitamins, salt scrubs,

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<sup>1</sup> GNC also sells supplements through nationwide brick-and-mortar corporate and franchise stores. These stores are not included in the class definition.

books, fitness monitors, tea, shampoo, meal replacements, and diet products. *Id.* ¶ 6. Accordingly, prices—let alone sale prices and promotions—are not uniform across GNC products (or even with respect to the same product) throughout the year(s) and establishing those prices depends on disparate considerations. *Id.* This variation also means that GNC prices are sometimes, but not always, the best available price for the product in a particular market. *Id.*

GNC’s product pricing is set apart from its competitors due to its extensive, exclusive membership program, which from at least 2012 to December 2016, customers could join by purchasing a “Goldcard” annual membership, and its proprietary GNC branded products. *Id.* ¶ 7. As a key benefit of GNC’s membership program, members receive separate member pricing (regular and sale prices) for all GNC products. *Id.* Paying the annual fee for this membership program benefits customers only if they receive product prices that are *better* than GNC’s regular prices. *Id.* In other words, GNC must—and in fact regularly does—offer its products at regular prices in order to incentivize customers to pay for its membership program and therefore member pricing. *Id.*; see FAC (Dkt. 10) ¶ 23 (“Sale prices are found only on select products, thereby reinforcing the perception that these products are on sale.”). Indeed, at any given time, the majority of the thousands of products on GNC’s website are offered at regular price. Maloberti Decl. ¶ 7. GNC also offers proprietary GNC-branded products that are priced separately from third-party branded products due to factors including manufacturing costs, among others, not present in the sale of third-party branded products. *Id.* ¶ 8.

#### **B. Plaintiffs’ Counsel Failed to Adequately Confer Regarding Discovery.**

Plaintiffs claim time is “too short,” they have had to hold Defendants “accountable,” and they have been “diligent.” Mem. (Dkt. 33-1) at 4. Yet Plaintiffs failed time and again to confer with GNC and instead insisted on vastly overbroad discovery on a non-viable class, repeatedly chose to involve the Court, and added

1 further delay by taking three weeks to file this Motion. Because Plaintiffs have not  
2 adequately engaged in the meet and confer process and have not proposed an  
3 alternative for a sampling procedure, Plaintiffs' Motion is premature.

4 On August 26, 2016, Plaintiffs served their First Set of Requests for  
5 Production of Documents and First Set of Special Interrogatories to GNC.  
6 Declaration of Zana Bugaighis ("Bugaighis Decl.") ¶ 2. On September 26, 2016,  
7 GNC served Objections and Responses. *Id.* ¶ 3; Dkts. 33-5 & 33-6. GNC objected  
8 to Plaintiffs' broad discovery requests into all GNC products because discovery  
9 beyond the three products purchased by Plaintiffs was not reasonably calculated to  
10 lead to the discovery of admissible evidence. Bugaighis Decl. ¶ 3; Dkts. 33-5 & 33-  
11 6.

12 Counsel for both parties subsequently met and conferred telephonically and  
13 exchanged letters regarding the scope of discovery. Bugaighis Decl. ¶ 4. In  
14 response to Plaintiffs' concerns, GNC memorialized the understandings between the  
15 parties, agreed to produce additional information, and informed Plaintiffs that GNC  
16 was "considering possible compromise approaches" to discovery. *See* Dkt. 33-1 at  
17 2.

18 On November 1, 2016, counsel for both parties had a discovery conference  
19 call with Judge Burkhardt regarding Plaintiffs' discovery concerns. Bugaighis Decl.  
20 ¶ 5. Counsel presented their respective positions regarding the scope of appropriate  
21 discovery and specifically argued regarding Plaintiffs' requests into GNC's  
22 membership pricing. *Id.* Counsel for GNC explained Plaintiffs' discovery requests  
23 were grossly overbroad and that products outside those purchased by Plaintiffs were  
24 not a proper source of discovery. *Id.* Judge Burkhardt reserved ruling on any  
25 dispute but indicated that she agreed that membership pricing was not within the  
26 proper scope of discovery. *Id.* Counsel for GNC stated it would serve amended  
27 discovery responses on November 10, 2016 and that GNC was working on a  
28 sampling proposal in order to avoid a prolonged discovery dispute. *Id.* Counsel for

1 GNC stated it was awaiting final approval, but believed GNC would propose each  
 2 party would pick three products from each of GNC's nine distinct product  
 3 categories. *Id.* GNC clarified that it believed this sampling would demonstrate to  
 4 Plaintiffs why discovery into GNC products besides those purchased by Plaintiffs  
 5 was improper. *Id.* Judge Burkhardt approved of a sampling procedure and  
 6 encouraged the parties to confer regarding a procedure that was workable for both  
 7 parties. *Id.* Judge Burkhardt gave the parties until November 21st to confer, thereby  
 8 providing the parties over a week after Plaintiffs received GNC's amended  
 9 responses to confer further. *Id.* Judge Burkhardt encouraged the parties to attempt  
 10 to work through issues without the Court's involvement. *Id.*

11 Immediately following the conference with Judge Burkhardt, the parties met  
 12 and conferred regarding a sampling procedure.<sup>2</sup> *Id.* ¶ 6. Plaintiffs appeared  
 13 receptive but were concerned with choosing products off of the GNC website. *Id.*  
 14 Instead, Plaintiffs requested a list of all GNC products sold online to facilitate their  
 15 determination of what products they would want to request for a sampling  
 16 procedure. *Id.* Defense counsel agreed to consult with GNC regarding the  
 17 availability of a product list. *Id.* Counsel for GNC explained that they would need  
 18 final approval from GNC on any sampling procedure but were interested in hearing  
 19 from Plaintiffs regarding what type of procedure they envisioned. *Id.* Plaintiffs  
 20 claimed they would need to negotiate regarding the number of products in order to  
 21 obtain a statistically significant sample. *Id.* GNC explained that the purpose of the  
 22 sampling proposal was to demonstrate why discovery was inappropriate, not to  
 23 provide a statistically significant sample for the purposes of class certification. *Id.*  
 24 GNC stated it had no interest in providing Plaintiffs with copious amounts of GNC  
 25 data to aid in their attempt to find a factual basis for their claims. *Id.*

27 \_\_\_\_\_  
 28 <sup>2</sup> Plaintiffs omit this conference from their recitation of the parties' meet and confer efforts.

On November 10, 2016, as represented to the Court, GNC significantly amended its discovery responses. *Id.* ¶ 7; *see also* Dkts. 33-13 & 33-14. In response to requests where GNC had previously agreed to produce documents relating only to the three products purchased by Plaintiffs, GNC now agreed to produce documents regarding all products included in the parties' to be agreed-upon sampling procedure. Bugaighis Decl. ¶ 7. GNC also agreed to produce documents regarding its computer systems and general policy documents. *Id.* However, GNC was unable to provide an estimate regarding the timing of production until a sampling procedure was agreed upon. *Id.* And because GNC had not yet made a production of documents (it made its first production the next day subject to the parties' approved protective order), its interrogatory responses referenced that GNC would supplement to provide responsive bates ranges.<sup>3</sup> *Id.* Counsel for GNC continued to attempt to locate a product list to assist Plaintiffs in product selection (one had to be created) and to obtain approval from GNC (which it received). *Id.* ¶ 8.

GNC heard nothing from Plaintiffs regarding a counterproposal to GNC's sampling procedure. *Id.* ¶ 9. Instead, on Friday, November 18, 2016, Plaintiffs sent a letter claiming GNC's responses were deficient and they would move to compel. *Id.* ¶ 11; Dkt. 33-15. Plaintiffs' letter abandoned any pretense of engaging in meaningful meet and confer discussions and underscored Plaintiffs' fishing attempts. Bugaighis Decl. ¶ 11. Plaintiffs' proposal was as follows:

If Defendant believes Request Nos. 1 & 2 to [be] overly burdensome, Plaintiffs are willing accept a copy of the databases which contains responsive information in lieu of requiring Defendant to search for and compile any responsive documents. This proposal would eliminate Defendant's cost associated with querying such data.

Dkt. 33-15 at 3; *see also* Mem. at 24.

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<sup>3</sup> GNC is preparing to serve supplemental interrogatory responses providing further information regarding its computer systems and bates ranges. Bugaighis Decl. ¶ 15.

1 GNC responded on Saturday, November 19, 2016.<sup>4</sup> Bugaighis Decl. ¶ 12;  
 2 Dkt. 33-16. GNC expressed surprise at Plaintiffs' sudden unwillingness to confer on  
 3 discovery issues. Bugaighis Decl. ¶ 12; Dkt. 33-16. GNC also corrected Plaintiffs'  
 4 assertion that GNC had not provided a proposed sampling methodology and  
 5 indicated its willingness to continue discussions. Bugaighis Decl. ¶ 12; Dkt. 33-16  
 6 at 2. Finally, GNC expressed that any action with the Court was premature as the  
 7 parties had yet to confer again as required by Judge Burkhardt:

8 Because Plaintiffs have not adequately engaged in the meet and confer  
 9 process and have not proposed an alternative for a sampling procedure, a  
 10 conference with the Court is premature. It is entirely improper for  
 11 Plaintiffs to refuse to respond to GNC's sampling procedure and  
 12 Amended Responses for over a week just to demand a conference with  
 the Court on the last day on which to do so and without the benefit of  
 further discussion.

13 Dkt. 33-16 at 2; Bugaighis Decl. ¶ 12.

14 Plaintiffs pressed for a discovery conference regardless. Bugaighis Decl. ¶ 13.  
 15 On November 21, 2016, the parties outlined their discovery positions to this Court.  
 16 *Id.* The Court indicated it would like the parties meet and confer in an attempt to  
 17 resolve their issues. *Id.* However, less than an hour later, Plaintiffs requested a  
 18 phone call and informed defense counsel that they were not willing to negotiate with  
 19 GNC regarding sampling, were entitled to discovery regarding all GNC products,  
 20 and would be filing a motion to compel. *Id.* Counsel for GNC expressed regret at  
 21 Plaintiffs' unwillingness to continue the meet and confer process and informed  
 22 Plaintiffs that it remained "ready and willing to continue discussions regarding an  
 23

24  
 25 <sup>4</sup> Plaintiffs claim Mr. Kashima did not timely receive communications from defense  
 26 counsel on two instances. Mem. at 10, n.6. But Plaintiffs failed to reveal that the  
 27 reason Mr. Kashima did not receive these communications is that defense counsel  
 28 replied to emails sent by Mr. Kashima's assistant and she had apparently failed to  
 include Mr. Kashima both occasions. Bugaighis Decl., Exs. A & B. Regardless, *five*  
 other Plaintiffs' attorneys and Mr. Kashima's assistant were included on all  
 communications. *Id.* ¶ 10.

appropriate sampling methodology.” *Id.*, Ex. C. GNC is still willing to do so. Plaintiffs then waited a full *three weeks* before filing their over length Motion.

### III. ARGUMENT AND AUTHORITY

#### A. Plaintiffs’ Complaint Fails to Plead a Factual Basis Supporting Broad Class Discovery.

Plaintiffs are not entitled to boundless discovery in their attempt to manufacture a class. Under Rule 26(c), the Court has broad discretion to manage discovery and to minimize the costs and burdens on the parties. “Rule 26 vests the trial judge with broad discretion to tailor discovery narrowly ....” *Crawford-El v. Britton*, 523 U.S. 574, 598-99 (1998).

Since *Twombly* and *Iqbal*, courts have clearly recognized that class actions must comply with the same minimum pleading requirements under Rule 8(a) to proceed to class discovery. *See, e.g., Villegas v. J.P. Morgan Chase & Co.*, No. C 09-00261 SBA, 2009 WL 605833, at \*3 (N.D. Cal. Mar. 9, 2009) (dismissing in part wage-and-hour class action for failing to allege specific facts regarding claims); *Harding v. Time Warner, Inc.*, No. 09-cv-1212-WQH-WMC, 2010 WL 457690, at \*5-6 (S.D. Cal. Jan. 26, 2010) (granting motion to dismiss against class action claims for overtime); *Nicholas v. CMRE Fin. Servs., Inc.*, No. 08-4857, 2009 WL 1652275, at \*4-5 (D.N.J. June 11, 2009) (granting defendant’s Rule 12(e) motion for more definite statement based on insufficient factual basis for conclusory class allegations). In pleading a class action, plaintiffs are required to come forward with *facts* that plausibly support the existence of a class. Plaintiffs cannot simply rely on overbroad, conclusory contentions and legal conclusions. The reason for enforcement of this pleading requirement to class-action allegations is clear. Without the courts acting as the gatekeeper, any consumer who believes they were wronged could simply allege, without any plausible basis or information, that some vague “policy” or “procedure” exists, and that it is applied to a class of people about whom the plaintiff has no knowledge or information whatsoever.

“A bare allegation of wrongdoing ... is not a fair reason for requiring a defendant to undertake financial burdens and risks to further a plaintiff’s case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 363 (1978) (class action against investment fund for allegedly artificially inflating the price of fund shares). Many courts have recognized high pleading standards, such as the broad fraud allegations plead here, require particularized allegations.<sup>5</sup> “[D]iscovery is not intended as a fishing expedition permitting the speculative pleading of a case first and then pursuing discovery to support it; the plaintiff must have some basis in fact for the action.” *Zuk v. E. Pa. Psychiatric Inst. of the Med. Coll.*, 103 F.3d 294, 299 (3d Cir. 1996) (copyright infringement action). “The discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim.” *Micro Mot., Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) (patent infringement action) (emphasis in original) (citing cases). “That the discovery might uncover evidence showing that a plaintiff has a legitimate claim does not justify the discovery request[.]” *Id.*; *see also Evans v. Calise*, No. 92-cv-8430, 1994 WL 185696, at \*1 (S.D.N.Y. May 12, 1994) (“The party seeking the discovery must make a prima facie showing that the discovery sought is more than merely a fishing expedition.”) (libel action).

For example, in *Samsung SDI Co. v. Matsushita Electric Industrial Co.*, No. CV 05-8493 AG (SHX), 2007 WL 4328482 (C.D. Cal. May 17, 2007), the court denied defendants’ attempt to obtain broad discovery in a patent infringement action:

The Court also finds unpersuasive Defendants’ argument that the discovery sought may lead to the discovery of admissible evidence under Fed. R. Civ. P. 26(b)(1). Defendants’ argument is based upon Defendants’ unsupported conjecture that products which have not been

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<sup>5</sup> Plaintiffs’ fraud claims are subject to a higher pleading standard under Federal Rule of Civil Procedure 9(b), much like the stringent requirements for pleading copyright or patent infringement.

specifically accused by model name or number may potentially be similar or identical to the Accused Products and speculation, without any evidentiary support, that such products may have been the subject of potentially infringing activity in the United States.

*Id.* at \*3. The court found “Defendants’ argument that it needs the information rests on its own failure to conduct a reasonable inquiry into the nature of such products.”

*Id.* at \*2.

The instant case presents a scenario where Plaintiffs have provided no factual allegations regarding any of the thousands of products sold on GNC.com other than the minimal allegations they provided regarding those products they purchased. Plaintiffs’ FAC contains merely conjecture and legal conclusions regarding GNC’s alleged conduct, which Plaintiffs wish to use as a basis for discovery regarding the entirety of GNC’s pricing practices.

Plaintiffs’ own claims are extremely limited and cannot be generalized across the entirety of GNC’s business. Plaintiffs allegedly purchased three products at GNC.com: a third-party whey protein powder, a third-party herbal supplement, and a third-party branded protein bar. FAC ¶¶ 25, 27. Plaintiffs were able to purchase these items on sale, at prices lower than GNC’s advertised regular price. *Id.* ¶¶ 25, 27. Plaintiffs are not members of GNC’s exclusive membership program and thus did not purchase these products at member pricing. Plaintiffs also did not buy GNC-branded products. And Plaintiffs have no experience with or knowledge of the pricing for any of the remaining thousands of products sold on GNC.com.

Instead, Plaintiffs assert generally that GNC misled customers who purchased **any** products online through GNC.com by advertising products at discounted sale prices that were displayed against allegedly false “regular” prices from which the “savings” was discounted. Plaintiffs claim **all** advertised discounts were illusory because the represented “regular” prices were always artificially inflated and were never the original or market prices for products sold through GNC.com. Plaintiffs seek to represent a class of:

1 All persons in the State of California who, within the applicable statute  
 2 of limitations preceding the filing of this action, purchased a product  
 3 from the GNC website at www.gnc.com.

4 FAC ¶ 41.

5 But the extent of Plaintiffs' allegations regarding the products **not** purchased  
 6 by Plaintiffs is that "[t]hese false discounts are not limited to the products that  
 7 Plaintiff purchased. Instead, these false and misleading discounts appear on a **large**  
 8 **percentage** of GNC's products." FAC ¶ 34 (emphasis added). Plaintiffs fail to  
 9 plead any **facts** regarding any other products on which GNC allegedly  
 10 misrepresented its pricing and do not attempt to quantify a "large percentage."  
 11 Reference pricing in and of itself is **not** a fraudulent pricing scheme. Plaintiffs  
 12 cannot simply rely on GNC's use of reference pricing for the sale of some of its  
 13 online products for the right to investigate **all** GNC products over a four-year time  
 14 frame. Plaintiffs did not even attempt to analyze GNC's website to find a single  
 15 other example of a product they believed to be incorrectly priced. In fact, Plaintiffs'  
 16 allegations weigh against a finding that GNC misrepresented price discounts on all  
 17 of the **six thousand** of products for sale on its website. Instead, Plaintiffs  
 18 specifically allege "[s]ale prices are found only on select products, thereby  
 19 reinforcing the perception that these products are on sale." FAC ¶ 23. And  
 20 Plaintiffs admit GNC's intent regarding its independent pricing of each product is an  
 21 important factor to their liability. *See* Mem. at 16-17. Thus, Plaintiffs have no basis  
 22 for requesting discovery into **thousands** of GNC products and purchases that they  
 23 now demand.

24 Plaintiffs' citation to *Spieker v. Quest Cherokee, LLC*, No. 07-1225-EFM,  
 25 2008 WL 4758604 (D. Kan. Oct. 30, 2008), is inapposite. There the plaintiff sought  
 26 to represent a class consisting of owners of mineral and/or royalty interests in a  
 27 Kansas portion of the Cherokee Basin who were allegedly not paid the proper  
 28 amount of royalties. *Id.* at \*1. The defendant argued that the cost of the named

plaintiffs' claim did not justify discovery. *Id.* at \*2. GNC does not make a similar claim. Instead, GNC has produced documents regarding every customer purchase for a four-year period of the three products specifically detailed in Plaintiffs' FAC.<sup>6</sup> Plaintiffs' citation to *Barnhart v. Safeway Stores, Inc.*, No. CIV.S-92-0803WBS JFM, 1992 WL 443561, at \*3 (E.D. Cal. Dec. 14, 1992), is also contrary to Plaintiffs' position. That decision was made in the context of an employment class action, where the plaintiffs had alleged a general policy that was uniform based on a common collective bargaining agreement. *See id.* at \*5. Moreover, the Court in *Barnhart* approved of a sampling procedure for certain discovery. *Id.* at \*7.

In fact, in Plaintiffs' Motion to Compel, Plaintiffs *admit* they have no knowledge of which (if any) other products were "subject to the alleged misrepresented discounts." Mem. at 13. Plaintiffs claim "[i]t is only with [documents responsive to Requests 1 and 24] that Plaintiffs *can determine what products were subject to the alleged misrepresented discounts* and the extent to which class members were damaged." *Id.* (emphasis added). Plaintiffs' fishing expedition to obtain discovery for the entirety of GNC's inventory when they have no facts to support this inquiry is untenable. This Court should not permit Plaintiffs to impose burdensome and extensive discovery in their attempt to manufacture a class.

**B. Even If Plaintiffs Plead Claims Related to "Other" Products, Plaintiffs' Discovery Requests Are Unfairly Broad and Burdensome.**

Plaintiffs' discovery, as written, is not reasonably calculated to lead to the discovery of admissible evidence. In fact, Plaintiffs seem determined to request any and all documents in GNC's possession that could even potentially relate to any

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<sup>6</sup> GNC was unable to pull customer web sales data for the protein bars allegedly purchased by Plaintiff Carter. GNC has additionally been unable to verify Plaintiff Carter actually purchased this product. Plaintiffs' counsel has failed to provide any information that would aid in identifying Ms. Carter's alleged purchase despite being repeatedly informed of the fact that GNC has no record of it. Bugaighis Decl. ¶ 14.

1 aspect of GNC's pricing, whether or not reasonably calculated to lead to the  
 2 discovery of admissible evidence. *See* Dkt. 33-13. And Plaintiffs' own theory of  
 3 classwide liability—that GNC employs a common unlawful pricing policy for all its  
 4 products—requires only general policies and procedures that apply to all GNC  
 5 products, which GNC has already agreed to produce:

6 GNC will produce responsive, non-privileged documents that constitute  
 7 policies and procedures for establishing the PRICE, REGULAR PRICE,  
 8 or SALE PRICE of online products to the extent GNC relied on those  
 9 documents to establish the PRICE, REGULAR PRICE, or SALE PRICE  
 of online products from April 2012 to April 2016.

10 *Id.* at Response to RFPs 7, 9-11, 14, 21.<sup>7</sup>

11 Plaintiffs' requests boldly ignore any differentiation among any of the *six*  
 12 *thousand* products GNC sells online, including GNC's proprietary branded  
 13 products, and the additional products GNC sells at its corporate and franchise stores.  
 14 Plaintiffs not only fail to limit their requests based on type of product, but seek  
 15 broad-based burdensome discovery related to all such products, including  
 16 "proposed" changes to pricing displays, marketing strategies, and advertisements.

17 For instance, Plaintiffs request that for a period of four years, GNC produce  
 18 the regular, sale, and member prices at which each and every product GNC sells  
 19 online and in its corporate and franchise stores was offered at. Dkt. 33-13 at RFPs 1  
 20 & 2. This request alone would require GNC to pull information about the prices  
 21 each product was offered at over each two-month pricing period (which information  
 22 could vary period to period) as well as investigate what, if any, promotions applied  
 23 to those products for each period.

24  
 25  
 26 \_\_\_\_\_  
 27 <sup>7</sup> GNC continues to search for policy documents applicable to online product pricing.  
 28 Plaintiffs also served a 30(b)(6) Notice of Deposition which GNC intends to respond  
 to and designate witnesses to testify regarding product pricing policies and  
 procedures.

1 Plaintiffs further demand (for a four-year period) “all documents and data  
2 relating to”:

- 3 • GNC’s establishment of sale, regular, and membership pricing of every  
4 GNC product (for every pricing period);
- 5 • “Changes or proposed changes” to any GNC pricing determination;
- 6 • GNC’s online pricing display;
- 7 • “changes or proposed changes” to GNC’s online pricing display;
- 8 • sales and marketing strategies for discounted online products;
- 9 • “changes or proposed changes” to the marketing or advertising of  
10 discounted online products;
- 11 • the effectiveness and/or financial effect of discounts and/or marketing;
- 12 • the pricing of competitors for any and all GNC products;
- 13 • manufacturing costs for online products;
- 14 • marketing materials and advertisements;
- 15 • customer and regulatory complaints regarding discounts;
- 16 • all contracts with suppliers and manufacturers of online products;
- 17 • revenue from online sales;
- 18 • data models of customer databases;
- 19 • policies and/or terms and conditions governing customer transactions;
- 20 • all online and in-store price and profitability comparisons.

21 *Id.* at RFPs 3-41, 43. In the parties’ meet and confer, Plaintiffs explained that  
22 Request 26 alone required the production of screenshots and/or logs regarding **every**  
23 **time** the pricing display for **any** GNC product changed online. Bugaighis Decl. ¶ 4.  
24 Plaintiffs further demand the identity of each customer who purchased a product  
25  
26  
27  
28

1 with a regular price online,<sup>8</sup> all documents related to GNC's compliance with state  
 2 and federal law (which they dispute is equivalent to GNC's defense in this case), and  
 3 hardware/software configurations of each GNC computer and database. Dkt. 33-13  
 4 at RFPs 23-24, 42. Even if Plaintiffs had made factual allegations under which class  
 5 discovery beyond the products purchased was appropriate, Plaintiffs' discovery  
 6 requests are extraordinarily broad. And when applied over six thousand total  
 7 products that GNC sells online alone, the discovery sought by Plaintiffs is almost  
 8 incomprehensible. For example:

9 ***Plaintiffs' Requests for "Changes to" or "Proposed Changes to."*** Plaintiffs'  
 10 requests for "changes to" or "proposed changes to" its pricing determinations, online  
 11 pricing display, and marketing and advertising contemplates discovery of virtually  
 12 all internal communications ever had about any of the thousands of products sold by  
 13 GNC, which would require innumerable hours to review prior to production.  
 14 Clearly such discovery is not reasonably contemplated by the Federal Rules and  
 15 goes far beyond what is necessary here for Plaintiffs to seek certification of their  
 16 purported class.

17 ***Plaintiffs' Requests for ESI.*** Plaintiffs' discovery requests regarding GNC's  
 18 computer systems and databases go beyond what is permitted or allowed. In fact,  
 19

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20 <sup>8</sup> Plaintiffs in their Motion indicate they will not seek the identity of customers  
 21 at this stage, reserving the right to seek such information after class certification. To  
 22 be clear, GNC would oppose any request for discovery of the identity of class  
 23 members prior to class certification. The Ninth Circuit has affirmed the denial of a  
 24 request for production of the names of putative class members "to solicit support" for  
 25 a plaintiff's efforts to certify a class. *See Hatch v. Reliance Ins. Co.*, 758 F.2d 409,  
 26 416 (9th Cir. 1985). Indeed, "[c]ourts have ordinarily refused to allow discovery of  
 27 class members' identities at the precertification stage out of concern that plaintiffs'  
 28 attorneys may be seeking such information to identify potential new clients, rather  
 than to establish the appropriateness of certification." *Dziennik v. Sealift, Inc.*, No.  
 05-CV-4659, 2006 WL 1455464, at \*1 (E.D.N.Y. May 23, 2006) (denying  
 production of unredacted documents identifying class members); *see also In re*  
*Mortgagors of Temple-Inland Mortg. Corp.*, No. Civ. A. 99-CV4633, 2001 WL  
 177181, at \*2 (E.D. Pa. Jan. 24, 2001); *Buycks-Roberson v. Citibank Fed. Sav. Bank*,  
 162 F.R.D. 338, 342 (N.D. Ill. 1995); *Flanigan v. Am. Fin. Sys. of Ga.*, 72 F.R.D.  
 563, 563 (M.D. Ga. 1976); and *Crabtree v. Hayden, Stone Inc.*, 43 F.R.D. 281, 282-  
 83 (S.D.N.Y. 1967).

1 they go beyond even what is contained in the Northern District ESI Guidelines.  
 2 Plaintiffs request “All DOCUMENTS and DATA that REFER or RELATE to all  
 3 ‘data models’ of each database ....” Dkt. 33-13 at RFP 43. Despite Plaintiffs’  
 4 overreaching requests, GNC, in an effort to reach a compromise, agreed to provide  
 5 information detailing the parameters of its computer systems and databases to the  
 6 extent it could. GNC agreed to provide this information to demonstrate the type of  
 7 systems GNC utilizes and to illustrate to Plaintiffs that such systems are not as easily  
 8 queried as they presume. GNC believes that this discovery will show that data is not  
 9 easily compiled or extractable, requiring individual screenshots of each responsive  
 10 page.

11 Plaintiffs also claim a simple search of GNC’s databases will cause the above  
 12 data to materialize. But Plaintiffs’ argument goes only to the *burden* associated with  
 13 such production, not to the *overbreadth* of Plaintiffs’ requests. GNC’s objections  
 14 relate to the overbreadth of the requests against the lack of factual allegations in  
 15 Plaintiffs’ complaint and the number of products for which such discovery is  
 16 requested. Simply because GNC may be able to obtain the information in question  
 17 does not mean that Plaintiffs are entitled to it. Plaintiffs’ requests for access to  
 18 GNC’s databases are a blatant attempt to fish for information that may substantiate  
 19 their unsupported class allegations.

20 ***Plaintiffs’ Requests for GNC Policies and Procedures.*** Plaintiffs insist upon  
 21 production of not only GNC’s policies and procedures relied on for pricing of the  
 22 products purchased, which GNC has agreed to produce, but “[a]ll documents and  
 23 data relating” to “current and legacy policies and procedures,” irrespective of  
 24 product-type or source. Dkt. 33-13 at RFP 7. Further, Plaintiffs assert they are  
 25 “entitled” to all drafts (regardless of whether they were implemented) and policies  
 26 (regardless of whether they applied). Mem. at 25-26. Such information again would  
 27 require GNC to delve into each of the various groups responsible for making pricing  
 28 determinations and produce any and all discussions about, or drafts of changes to

1 such policies and procedures, despite the fact that such procedures were never  
 2 implemented, and thus could have no effect on decisions made by consumers that  
 3 make up the purported class.

4 ***GNC's Legal Compliance.*** Plaintiffs request all documents demonstrating  
 5 GNC's "compliance with federal or state laws and regulations regarding the  
 6 advertisement of discount prices" on GNC.com. Dkt. 33-13 at RFP 23. GNC  
 7 offered to produce all documents it will use in its defense to show that it complied  
 8 with federal and state laws. Plaintiffs do not explain how GNC's proposal is  
 9 inadequate. Mem. at 26.

10 ***Membership pricing.*** Plaintiffs concede their claims do not implicate  
 11 membership pricing yet argue this information is nevertheless discoverable because  
 12 "information regard [sic] various prices at which Defendants offer their products are  
 13 relevant to Plaintiffs' claims." Mem. at 27. But as explained above, access to  
 14 GNC's membership prices are due to certain customers' purchase of *memberships*,  
 15 which enables GNC to offer lower prices to those individuals. Accordingly, such  
 16 information is wholly irrelevant to Plaintiffs' claims here.

17 ***GNC Branded Products.*** GNC manufactures and sells its own proprietary  
 18 GNC-branded products. Because GNC does not purchase these products from a  
 19 third party, it is able to pass greater cost savings to GNC customers. Thus, GNC-  
 20 branded product pricing is not similarly situated to third-party product pricing.  
 21 Further, Plaintiffs did not purchase any GNC-branded products.

### 22 **C. GNC's Responses and Production Are Reasonable.**

23 As explained above, GNC initially limited its production to documents  
 24 regarding the products purchased by Plaintiffs. However, in an effort to avoid  
 25 discovery disputes and in order to demonstrate to Plaintiffs that the pricing for other  
 26 GNC products is not similarly situated to those alleged in the FAC, GNC also agreed  
 27 to produce documents regarding agreed-upon products as part of a sampling  
 28 procedure. Plaintiffs continue to insist on obtaining all discovery requested. But

1 Plaintiffs’ motion (and Mr. Kashima’s declaration) reflects a lack of attention to what  
 2 they have already received in their overzealous attempt to obtain invasive discovery  
 3 as to all GNC products.

4 **Document Productions.** GNC has made four productions of documents:  
 5 November 11, 2016, November 28, 2016, December 13, 2016, and January 10, 2017.  
 6 Mr. Kashima claims most of GNC’s document production is spreadsheets of  
 7 “unknown significance.” Dkt. 33-2 ¶¶ 20, 25. He also claims GNC produced a mere  
 8 eight responsive documents. Yet one of these spreadsheets is four years of sales data  
 9 (both in-store and online) for the three products Plaintiffs’ purchased. Bugaighis  
 10 Decl. ¶ 16. Others include pricing data for the three products over the same four-year  
 11 period and the product lists Mr. Kashima claims GNC never produced. *Compare*  
 12 Dkt. 33-2 ¶ 19 *with* Bugaighis Decl. ¶ 16. Thus, directly contrary to what Mr.  
 13 Kashima represents, GNC proposed a sampling procedure, produced lists of products  
 14 from which Plaintiffs could select a sample, and were ready and willing to confer  
 15 further at any time. Bugaighis Decl. ¶ 16. In fact, GNC had to specially create the  
 16 product lists as Plaintiffs requested (GNC felt its website had a sufficient product  
 17 listing). GNC continues to collect and produce documents. GNC is also ready and  
 18 willing to continue to discuss a sampling procedure with Plaintiffs at any time.

19 **Interrogatories.** As described above, GNC served its amended interrogatory  
 20 responses prior to making a document production due to the timing of the signed  
 21 protective order. GNC is preparing to serve supplemental interrogatory responses to  
 22 include the responsive bates ranges. *Id.* ¶ 15. GNC will continue to do so  
 23 throughout discovery as necessary.

24 **Attorney-Client Privilege.** Plaintiffs claim that because GNC did not produce  
 25 a privilege log with its objections, it waived its privilege, is absurd. GNC has not  
 26 waived its attorney-client privilege and work product privileges. The Ninth Circuit  
 27 specifically rejected “a per se waiver rule that deems a privilege waived if a  
 28 privilege log is not produced within Rule 34’s 30-day time limit.” *Burlington N. &*

1 *Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 (9th  
 2 Cir. 2005). As GNC produces documents, it will log those documents withheld  
 3 based on privilege, if any, on a privilege log. GNC has yet to withhold documents  
 4 on this basis but reserves this objection in the instance it discovers responsive  
 5 documents subject to privilege.

#### 6 **D. Sampling Is Appropriate if Discovery Is Ordered.**

7 “[I]n the specific context of class-action discovery, sampling advances the  
 8 goal of proportionality set forth in Fed. R. Civ. P. 26(b)(3)(C)(iii).” *Feske v. MHC*  
 9 *Thousand Trails Ltd. P’ship*, No. 11-CV-4124-PSG, 2012 WL 1123587, at \*2 (N.D.  
 10 Cal. Apr. 3, 2012) (footnote omitted). Thus, “[t]o relieve the burden on a party, a  
 11 court may order a ‘sampling’ of records.” *Soto v. Castlerock Farming & Transp.,*  
 12 *Inc.*, 282 F.R.D. 492, 503-04 (E.D. Cal. 2012) (citing *Smith v. Lowe’s Home Ctrs.,*  
 13 *Inc.*, 236 F.R.D. 354, 357-58 (S.D. Oh. 2006) (“limiting discovery to a statistically  
 14 significant representative sampling ... will both reasonably minimize the otherwise  
 15 extraordinary burden imposed”); *Barnhart*, 1992 WL 443561, at \*7 (finding  
 16 “sampling is a reasonable compromise” and ordering the defendant to submit a  
 17 proposed sampling method to the plaintiff); *Cranney v. Carriage Servs., Inc.*, No.  
 18 2:07-cv-1587, 2008 WL 2457912 (D. Nev. June 16, 2008) (ordering the parties to  
 19 identify “ten percent of a relevant combination of workers and work sites,” and  
 20 limiting discovery to those identified”); *Smith v. T-Mobile USA, Inc.*, No. CV 05-  
 21 5274, 2007 WL 2385131, at \*4-5 (C.D. Cal. Aug. 15, 2007) (in the discovery  
 22 process, plaintiff “sampled” ten percent of the defendant’s store managers and  
 23 corporate employees).

24 Plaintiffs’ argument that producing data responsive to a sampling procedure  
 25 will be just as burdensome as producing data regarding all of GNC’s thousands of  
 26 products is nonsensical. *See* Mem. at 24-25. Simply put, a sampling procedure, by  
 27 definition, would require GNC to produce data only as to a subset of its entire  
 28 product line. Thus, GNC would not “have to examine the same transaction, pricing,

1 and sales data that was requested in Requests Nos. 1 and 24.” *Id.* at 25. Plaintiffs’  
 2 oversimplification of the discovery they seek as “the total number of purchases made  
 3 subject to the alleged misrepresentation, the identity of these products, and the total  
 4 value of these advertised discounts,” *id.* at 24, is belied by their expansive discovery  
 5 requests that they argue are necessary for class certification. And as Plaintiffs point  
 6 out, the parties must also analyze data to determine whether for each product, during  
 7 each period, GNC had the “intent not to sell that personal property or those services,  
 8 professional or otherwise, so advertised at the price stated therein, or as so  
 9 advertised.” *See* Cal. Bus. & Prof. Code § 17500.

10 Here, if the Court finds information regarding products other than those  
 11 specifically plead by Plaintiffs is discoverable, sampling is an appropriate method to  
 12 relieve the burden imposed upon GNC given the number of products involved. In  
 13 this way, Plaintiffs will be able to “test the veracity of Defendants’ claims,” *Mem.* at  
 14 22 n.15, without a free pass at an extremely broad fishing expedition.

#### 15 **IV. THE COURT SHOULD STRIKE THE FORREST DECLARATION AS** 16 **IMPROPER HEARSAY**

17 GNC moves to strike the Declaration of Douglas E. Forrest as lacking  
 18 personal knowledge and relying on inadmissible hearsay. Considering the contents  
 19 of an affidavit based in inadmissible hearsay is improper. An affidavit not based on  
 20 personal knowledge and in reliance on unsworn statements does not comply with the  
 21 federal rules. *Block v. City of L.A.*, 253 F.3d 410, 419 (9th Cir. 2001); *Skillsky v.*  
 22 *Lucky Stores, Inc.*, 893 F.2d 1088, 1091 (9th Cir. 1990).

23 Mr. Forrest claims to submit his declaration to “address the ready availability  
 24 of price data and the lack of any substantial burden in producing this data for all  
 25 products rather than for only 27 products.” Dkt. 33-18 ¶ 5. Yet Mr. Forrest admits  
 26 he has no personal knowledge of GNC’s applications, platforms, computer systems,  
 27 or databases (and no personal knowledge of Plaintiffs’ discovery). *Id.* ¶ 11. Instead,  
 28 Mr. Forrest relies on what “typical” systems might be able to do and alleged job

1 | postings and news articles. *Id.* ¶¶ 8, 10. Mr. Forrest's declaration is speculation (at  
 2 | best) and this Court should strike it from consideration.

3 | **V. CONCLUSION**

4 | Plaintiffs have no right to impose continued burdens and expenses on GNC in  
 5 | an attempt to substantiate their baseless class allegations. For these reasons, GNC  
 6 | respectfully asks the Court deny Plaintiffs' Motion to Compel.

7 |  
 8 | DATED: January 11, 2017

DAVIS WRIGHT TREMAINE LLP

9 | By: s/ Zana Bugaighis

10 | JAMES D. NGUYEN

11 | SEAN M. SULLIVAN

12 | ZANA BUGAIGHIS

13 | Attorneys for Defendants  
 14 | General Nutrition Centers, Inc. and  
 15 | GNC Holdings, Inc. (erroneously  
 16 | named as General Holdings, Inc.)  
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**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Southern District of California by using the Court's CM/ECF system on January 11, 2017. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the district's CM/ECF system.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this certificate was executed at Seattle, Washington on January 11, 2017.

/s/ Anita A. Miller

Anita A. Miller